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ACCU CASTING CO. INC.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ACCU CASTING CO. INC., a
California corporation,

Plaintiff,

v.

ELIZABETH YUNHONG ZOU, an
individual; ICEMC, INC., a California
corporation; CITIBANK, N.A., a
National Banking Association; TD
Ameritrade, a Delaware corporation;
and DOES 1 through 10, inclusive,

Defendants.

AND RELATED COUNTERCLAIM

Case No. 2:22-cv-05377 MEMF (AFMx)

The Hon. Maame Ewusi-Mensah
Frimpong, Judge Presiding

**DEFENDANT/COUNTER-
CLAIMANT ELIZABETH
YUNHONG ZOU'S NOTICE OF
MOTION FOR SUMMARY
JUDGMENT; JOINT BRIEF OF
MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
AND IN OPPOSITION TO ZOU'S
MOTION FOR SUMMARY
JUDGMENT**

Date: May 18, 2023
Time: 10:00 a.m.
Courtroom: 8B

Action filed: August 2, 2022
FAC filed: September 23, 2022

1 **TO ALL PARTIES AND THEIR COUNSEL OF RECORD:**

2 **PLEASE TAKE NOTICE** that on May 18, 2023 at 10:00 a.m., or as soon
3 thereafter as the matter may be heard, in the United States District Court, Central
4 District of California, located at 350 West First Street, Los Angeles, CA 90012 in
5 Courtroom 8B, the Honorable Maame Ewusi-Mensah Frimpong, presiding,
6 Defendant and Counter-Claimant Elizabeth Yunhong Zou will, and hereby does
7 move, pursuant to Rule 56 of the Federal Rules of Civil Procedure, for an Order
8 granting summary judgment in her favor.

9 This motion is made on the ground that RAYMOND G. MURILLO lacks
10 authority to file and maintain this lawsuit in the name of ACCU.

11 The Motion is made following the conference of counsel pursuant to L.R. 7-3
12 took place on December 20, 2022. *See* Declaration of Christopher D. Lee ¶2. This
13 Motion is based on the pleadings in this case, Defendant's Memorandum of Points
14 and Authorities in support of Summary Judgment, the declarations of Elizabeth
15 Yunhong Zou and Christopher D. Lee, Defendant's Separate Statement of
16 Uncontroverted Facts and Conclusions of Law, all files and records in this matter,
17 and on such other oral or documentary evidence as may be presented at the hearing
18 of this motion.

19 Respectfully submitted,

20
21 DATED: March 16, 2023

L.A. COMMERCIAL ATTORNEY, A PROF.
LAW CORP.

22 Christopher D. Lee

23 By: /s/Christopher D. Lee

24 Christopher D. Lee

25 Attorneys for Defendant/Cross-Complainant
26 ELIZABETH YUNHONG ZOU
27
28

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 **A. Moving Party's Introduction**

4 Plaintiff ACCU CASTING CO. INC.(“ACCU”) is formed by two equal
5 shareholders and directors, RAYMOND G. MURILLO(“MURILLO”) and
6 ELIZABETH YUNHONG ZOU(“ZOU”). A dispute arose between MURILLO and
7 ZOU in late 2021 after ACCU ’s long-time and only sourcing agent retired, which
8 caused the company to lose its ability to supply products from China.

9 Without coming to terms concerning ZOU’s exit from ACCU, MURILLO
10 unilaterally blocked ZOU from the company’s management, operation, cash reserves
11 and bank accounts, and filed Statement of Information in January 2022 declaring
12 himself as the “sole” director and officer. It is undisputed that the parties never
13 executed any corporate minute, consent, resolution or written agreement indicating
14 that ZOU ever agreed to resign as a director of ACCU.

15 MURILLO lacks authority to bring this lawsuit in the name of ACCU. Based
16 on ACCU’s bylaws, no officer has the power to enter into contracts or execute other
17 instruments or render ACCU “liable for any purposes or any amount” without
18 authorization from the Board of Director, the decision to prosecute this action,
19 including retaining ERVIN COHEN & JESSUP LLP in this case, must be first
20 approved by ACCU’s Board of Directors. *See* Ex. 11, p.75.

21 Indeed, similar to the president, director and shareholder litigant in *Anmaco,*
22 *Inc. v.Bohlken* (1993) 13 Cal. App. 4th 891, MURILLO is required by ACCU’s
23 bylaws to obtain approval from the Board of Director before engaging counsel.
24 Because ZOU is no longer involved in ACCU’s management since late 2021, and the
25 bylaws’ requires that all board actions must be approved with a majority of the
26 directors present constituting a quorum(Ex. 11, p.62 for ACCU Bylaws, Article II,
27 Section 14), MURILLO could not secure the required board approval prior to filing
28 this lawsuit and retaining counsel in ACCU’s name for this litigation. As such, this

1 action should be summarily dismissed.

2 **B. Opposing Party’s Introduction**

3 Elizabeth Zou’s (“Zou”) summary judgment motion should be denied because
4 there is a core, outcome dispositive dispute of material fact: whether Zou resigned as
5 a director of plaintiff Accu Casting, Inc. (“Accu”). As shown herein, that issue is hotly
6 disputed. For this reason alone, summary judgment cannot be granted. *See, e.g.,*
7 *Sonner v. Schwabe North America, Inc.*, 911 F.3d 989, 992 (2018).

8 Zou’s primary claim is that “because” the filing of this suit in August, 2022
9 was not approved by the company’s board of directors, it cannot be maintained. But
10 conspicuously missing from Zou’s papers is any proof - - much less even an allegation
11 - - that Zou was a board member at the time the suit was filed. Indeed, she makes no
12 such claim even in her counterclaims against the company (Dkt No. 36), nor does she
13 seek any determination from the Court on this point.

14 The reality is that in the late summer of 2021, Zou resigned from her positions
15 as CFO and board member of Accu, having previously, and without Accu’s
16 knowledge, assisted in forming a competitive company. Zou’s contemporaneous
17 communications - - a full year before this suit was filed - - to Raymond Murillo
18 (“Murillo”), the President and CEO of Accu, confirm this point:

19 ● In her August 31, 2021 email to Murillo she writes that “I agree that we
20 need to continue to communicate on what action needs to be taken **now that I have**
21 **resigned**”. Exhibit J at p. 1; emphasis added.

22 ● In her September 24, 2021 email to Murillo, she stated, “I told you that
23 I was tired and had no confidence in continuing to do business without Mr. Li. **So, at**
24 **that moment, I resigned. When I gave you my resignation, you got very**
25 **excited....**”) Exhibit J at p. 5; emphasis added.

26 ● In her October 4, 2021 email to Murillo, she stated, “**My decision to**
27 **resign** came after a long deliberation and careful consideration...”. Exhibit J at p. 4;
28 emphasis added.

1 These are party admissions and are binding on Zou now. *See* Fed. R. Evid.
2 801(d)(2). Put simply, Zou’s own words confirm that she resigned from the Company.

3 Notwithstanding the unequivocal nature of these communications, the Court
4 does not have to find that Zou resigned from her positions with Accu in order to deny
5 Zou’s motion. **As noted above, the motion must be denied for the simple reason**
6 **that whether or not Zou resigned is a disputed material issue.** *See Adickes v. S.H.*
7 *Kress & Co.*, 3988 U.S. 144 (1970). For this reason alone, the motion should be
8 denied.

9 **II. FACTUAL BACKGROUND**

10 **A. Moving Party’s Background**

11 **ZOU and MURILLO Are 50-50 Owners of ACCU**

12 ZOU and MURILLO are 50-50 are equal shareholders and directors of ACCU
13 since its inception in 2014. Counterclaimant’s Statement of Uncontroverted
14 Fact(“CUF”) No.1, Ex. A & B.

15 Before being excluded MURILLO from the ACCU, ZOU serves as ACCU’s
16 chief financial officer and secretary. CUF No.2, Ex. A & B.

17 **The August 2021 Meeting**

18 During 2021, ACCU’s long-time sourcing agent, Mr. Li retired and as result,
19 ACCU lost its contact with the manufactory. Zou Decl., ¶ 7.

20 In August 2021, ACCU’s owners, namely, ZOU and MURILLO had a meeting
21 in which ZOU indicated to MURILLO that she wanted to resign her position as the
22 vice president of the company. CUF No.3, Ex. E & F.

23 On August 30, 2021, MURILLO wrote a letter to ZOU on ACCU’s behalf,
24 stating that he “felt” the parties “had an agreement which was to accept your
25 resignation of being Vice President.” CUF No.4; Ex. F.

26 **ZOU and MURRILO Never Agreed on ZOU’s Exit Plan**

27 On October 4, 2021, ZOU wrote a written proposal to MURILLO for her exit
28 plan(i.e., resignation clauses). CUF No.5; Ex. G.

1 ZOU's written proposal contains three(3) clauses: (a) 50% profit sharing until
2 ACCU's receipt of receivable balance; (b) equally distributing ACCU's
3 assets(including the TD Fund) to the parties; and (c) cancelling the parties' business
4 partnership. Ex. G.

5 MURILLO never responded to ZOU's 10-4-2022 proposal. CUF No.6.

6 **MURRILO Excluded ZOU from ACCU**

7 Since late 2021, ZOU has no access to ACCU's management, operation, cash
8 reserves and bank accounts. CUF No.7.

9 On January 7, 2022, MURRILO filed a Statement of Information with
10 California Secretary of State, naming himself as the sole officer and director of
11 ACCU, filing of which was never consented by ZOU. CUF No.8; Ex. H.

12 Except for the Citi bank and TD Ameritrade accounts frozen by MURRILO,
13 MURRILO has the exclusive access and control to ACCU's cash. CUF No.9.

14 **Excluding ZOU was Never Approved by ACCU's Board of Directors**

15 There has been no corporate minute, consent, resolution or written agreement
16 signed by ZOU and MURRILO indicating that ZOU ever agreed to resign as a
17 director of ACCU. CUF No.10.

18 MURRILO's action to remove and block ZOU from ACCU was never voted
19 upon or approved by ACCU's shareholders or board of directors. DUF No.11.

20 Prior to filing of this lawsuit, no shareholder or director's meeting of ACCU
21 ever took place to vote on retaining ERVIN COHEN & JESSUP LLP. DUF No.12.

22 **B. Opposing Party's Background**

23 Accu is a California corporation in good standing that was formed in 2014. It
24 is in the business of distributing cooking equipment such as cast iron burners, top
25 grates, and die cast knobs to restaurants and retail customers. Thus, Accu distributes
26 to restaurant equipment distribution companies and wholesalers products such as cast
27 iron burners, top grates and die cast knobs, which are used by restaurants for meal
28 preparation. Declaration of Raymond G. Murillo ("Murillo Decl."), at ¶ 5, lines 2-3.

1 Murillo is the President and CEO of the company and its sole director. Murillo
2 Decl. at ¶ 2. Murillo and defendant Zou are the only shareholders of Accu and each
3 of them own 50% of the shares in the company. Murillo Decl. at ¶ 5.

4 At all times since its founding in 2014, the Company has maintained corporate
5 by-laws. A true and correct copy of those by-laws is attached as **Exhibit I** to the Joint
6 Evidentiary Appendix (“Appendix”). Under those bylaws, a board member may
7 resign merely by giving written notice thereof. Exhibit I at Article II, Section 19. The
8 bylaws also provide for the sole remaining board member to fill the vacancy created
9 by the resignation of his co-board member. *Id.* at Article III, Section 5.

10 Prior to her resignation in late summer, 2021, Zou was a board member and the
11 company’s CFO and Secretary. Zou’s role was also to manage the company’s finances
12 and to interface with the foundries in China which manufactured the commercial
13 restaurant products that Accu distributed. Murillo Decl. at ¶5.

14 In late 2021, Zou resigned from her positions as Accu’s CFO and board
15 member. Murillo Decl. at ¶ 6. She announced her resignation as Accu’s CFO and as
16 a board member to Murillo orally at their stockholders meeting on August 25, 2021.
17 *Id.* At that meeting, Murillo accepted Zou’s resignation. Zou also confirmed her
18 resignation in several email communications she thereafter sent to Murillo. *Id.* Those
19 communications are collectively attached as **Exhibit J** to the Appendix.

20 As a consequence of her resignation, and by operation of Article II, Section 19
21 of the company’s bylaws, Zou was no longer a director by late summer, 2021. In this
22 regard, the company’s bylaws also provide that upon the resignation of one of two
23 directors, the remaining director automatically becomes the sole director of the
24 company. Bylaws (Exhibit I), Article III, Section 5. Murillo Decl. at ¶ 7. In such a
25 circumstance, no consents, resolutions or other formal board or shareholder actions
26 are required to effectuate a board member’s resignation.

27 In her declaration, Zou alleges that she was “excluded” by Murillo from the
28 company’s affairs and Murillo “removed” or “blocked” her from involvement with

1 Accu. These allegations are false. Zou voluntarily resigned from Accu and Murillo
2 never “excluded”, “removed” or “blocked” her from having involvement in the
3 company’s affairs. Indeed, in the aftermath of her resignation, Zou was concerned
4 that she might have continuing liability from her roles as director and CFO. In that
5 regard, on August 31, 2021, she wrote to the company’s accountant and urged him to
6 file the necessary papers to remove her from any further connection with the
7 company. Murillo Decl. at ¶ 8. A copy of that letter is attached hereto as **Exhibit K**
8 to the Appendix.

9 Zou makes a number of allegations concerning the company’s deposit
10 accounts. For example, she alleges that following her resignation, she had no access
11 to the company’s deposit accounts. This statement is false. Indeed, following her
12 resignation, Zou continued to write checks for personal expenses on the company’s
13 accounts. For example, in December, 2021, Zou caused Citibank to issue a cashier
14 check from an Accu account in the amount of \$10,000 to the “Yang law firm” (Murillo
15 Decl. at ¶ 11 and Exhibit L thereto). Then in February 2022, Zou wrote check #1055
16 in the amount of \$10,000 from Accu’s East West Bank account to “Los Angeles
17 Commercial Attorney” – her present litigation counsel. (Murillo Decl. at ¶ 11 and
18 Exhibit M thereto).¹

19 These expenditures, which were unauthorized, represented payments to
20 lawyers retained by Zou for the purpose of suing the company. Murillo Decl. at ¶ 11.
21 True and correct copies of these checks are attached as **Exhibits L** and **M** to the
22 Appendix.

23 Another allegation that Zou makes is that Murillo gave instructions to TD
24 Ameritrade and Citibank to freeze those company accounts. Murillo did this after
25 Zou’s resignation to protect the company’s assets in circumstances where Zou
26

27 ¹ LA Commercial Attorney is the law firm that is presently representing Zou against
28 Accu in this case. See Dkt No. 36.

1 continued to have signature authority over those accounts and used that signature
2 authority to make personal and unauthorized disbursements from those accounts.
3 Indeed, following her resignation, Zou was involved in setting up a competing
4 company (ICEMC), with her son as the “President” of this company. Murillo’s efforts
5 to instruct Citibank and TD Ameritrade to freeze the two accounts was in furtherance
6 of his duties to the corporation. Murillo Decl. at ¶ 12.

7 **III. LEGAL STANDARD**

8 A motion for summary judgment should be granted if there is no genuine issue
9 of material fact and the moving party is entitled to judgment as a matter of law. Fed.
10 R. Civ. P. 56(c); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). Where
11 the party moving for summary judgment would not bear the burden of proof at trial,
12 the moving party “must produce either evidence negating an essential element of the
13 nonmoving party’s claim or defense or show that the nonmoving party does not have
14 enough evidence of an essential element to carry its ultimate burden of persuasion at
15 trial.” *Nissan Fire & Marine Ins. Co., Ltd. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102
16 (9th Cir. 2000).

17 **IV. MOVING PARTY’S ARGUMENT**

18 **A. ACCU’s Bylaws Requires Board Approval from Its Board of** 19 **Directors Prior to Filing Lawsuit.**

20 According to ACCU’s bylaws, MURILLO must obtain board approval before
21 engaging counsel to file this lawsuit using ACCU’s name.

22 The corporation’s bylaws(Ex.11)² states in relevant part that:

23 Article II, Section 1(Ex. 11, p.58):

24 The business and affairs shall be managed and all corporate powers
25

26 ² To avoid duplicative exhibits and in the interest of judicial economy, Defendant
27 will be referring to ACCU’s undisputed bylaws labeled as Ex. 11 in Plaintiff
28 ACCU’s motion for summary adjudication.

1 shall be exercised by or under the direct of the Board of Directors.

2 Article II, Section 14(Ex. 11, p.62):

3 A majority of the number of Directors shall be necessary to constitute a
4 quorum for the transaction of business, and the action of a majority of
5 the Directors present at any meeting at which there is a quorum, when
6 duly assembled, is a valid as a corporate act.

7 Article III, Section 7(Ex. 11, p.64):

8 President's power is "subject to the control of the Board of Directors."

9 Article VI, Section 5(Ex. 11, p.75):

10 No officer, agent or employee, shall have any power or authority to
11 bind the corporation by any contract or agreement, or to pledge its
12 credit, or to render it liable for any purpose or to any amount.

13 Evidently, ACCU's bylaws subjects the authority of its officers to the control
14 of the board of directors. Because no officer has the power to enter into contracts or
15 execute other instruments or render ACCU "liable for any purposes or any amount"
16 without authorization from the Board of Director, the decision to prosecute this action,
17 including retaining ERVIN COHEN & JESSUP LLP in this case, must be first
18 approved by ACCU's Board of Directors. *See* Ex. 11, p.75.

19 **B. MURILLO Lacks Authority to Bring This Lawsuit on Behalf of**
20 **ACCU.**

21 A summary judgment should be granted because MURILLO does not have
22 authority to bring this lawsuit against the other equal shareholder/director(i.e., ZOU)
23 in the name of ACCU. The undisputed facts in this case are:

- 24 • ZOU and MURILLO are equal shareholders and directors at ACCU.
25 (CUF Nos. 1-2; Ex.A & B)
- 26 • There has been no corporate minute, consent, resolution or written
27 agreement signed by ZOU and MURRILLO indicating that ZOU ever
28 agreed to resign as a director of ACCU. (CUF No.10).

- 1 • ZOU was ousted by MURILLO from ACCU. (CUF Nos. 7-9; Ex.H)
- 2 • MURILLO's removal of ZOU from ACCU was never voted upon or
- 3 approved by ACCU's shareholders or board of directors. (CUF No.11).
- 4 • No shareholder or director's meeting of ACCU ever took place to vote
- 5 on retaining ERVIN COHEN & JESSUP LLP. (CUF No.12).

6 California Appellate Court's decision in *Anmaco*, 13 Cal. App. 4th 891, 901 is
7 on-point because it was decided based on similar facts involving two 50-50
8 shareholders in a closely-held corporation and more importantly, a corporate bylaws
9 that is highly identical to ACCU's bylaws. (Ex. 11)

10 In *Anmaco*, a suit was brought in the name of the corporation by one of its
11 shareholder against the other shareholder. *Id.* at pp. 898-899. The appellant in the case
12 is, similar to MURILLO, the president, director and a 50% shareholder of the
13 corporation who purports to have "general supervision, direction and control of the
14 business and officers of the corporation" under the corporation's bylaws³. *Id.*

15 However, the *Anmaco* Court found that the corporation's bylaws imposed
16 restriction on the president/director's purported authority to file suit for behalf of the
17 company:

18 "The bylaws also provide that the president's exercise of his office is
19 subject to the control of the Board of Directors...." The bylaws further
20 state: "The business and affairs of the corporation shall be managed and
21 all corporate powers shall be exercised by or under the direction of its
22 Board of Directors. The president does not have the power to enter into
23 contracts or execute other instruments or render the corporation "liable
24 for any purposes or any amount" without board authorization." *Id.*

22 Based on review of the corporation's bylaws and finding of "restrictions on the
23 power of the corporate officers", the *Anmaco* Court held that the appellant has "no
24 power to institute litigation in the corporate name against the other 50 percent
25

26 _____
27 ³ See also ACCU's bylaws, Article III, Section 7: "the President,....., subject to the
28 control of the Board of Directors, have general supervision, direction and control of
the business and officers of the corporation." (Ex. 11. P.64)

1 shareholder.” *Id.* at pp. 898-899. It was further concluded that “[t]he proper vehicle
2 for such a suit, when the gravamen of the complaint is injury to the corporation, is a
3 shareholder's derivative action.” *Id.* at p. 900.

4 In addition to the *Anmaco* decision, courts in different states have made similar
5 rulings that a shareholder should only initiate a derivative proceeding in the event of
6 deadlock between the shareholders. *See e.g. Stone v. Frederick*, 245 A.D.2d 742, 666
7 N.Y.S.2d 294, 295 (N.Y.App.Div.1997) [“[W]here there are only two shareholders
8 each with a 50% share, an action cannot be maintained in the name of the corporation
9 by one stockholder against another with an equal interest and degree of control over
10 corporate affairs; the proper remedy is a stockholder's derivative action.”]; *Borkowski*
11 *MBI v. Fraternal Order of Police*, 155 F.R.D. 105, 110 (E.D.Pa.1994) [“The proper
12 vehicle for a suit, when the gravamen of the complaint is injury to the corporation,
13 and the shareholders are deadlocked, is a shareholder's derivative action.”]; *Gross v.*
14 *Adcomm, Inc.* 478 S.W.3d 396, 404(Ky. Ct. App. 2015)[Finding that when a 50%
15 owner of a corporation could authorize a corporation to file suit, then by parity of
16 reasoning the other 50% owner could compel the same corporation to either dismiss
17 the suit.]

18 Here, similar to *Anmaco*, ACCU’s bylaws placed clear restriction on
19 MURILLO’s authority to institute lawsuits, engage counsel, utilize ACCU’s funds in
20 this litigation, and any act that would render ACCU “liable for any purposes or any
21 amount.” (Ex. 11, p.75)

22 Under ACCU’s bylaws, all such corporate acts must be approved by the board
23 of director with a majority of the directors present constituting a quorum. (Ex. 11,
24 p.62) Indeed, a board’s action is legally invalid if taken when no quorum is present.
25 *Santandrea v. Siltec Corp.* (1976) 56 Cal. App. 3d 525, 528[informal approval by two
26 corporate directors did not validate alleged corporate action]; *Gieselmann v.*
27 *Stegeman*(Mo. 1969) 443 S.W.2d. 127, 135-136[so-called meeting of corporate
28 directors, held without notice or quorum, was illegal.] Given the undisputed fact that

1 ZOU has no access and is no longer involved in ACCU's management since late
2 2021(CUF No. 7), MURILLO does not and could not obtain any board approval or
3 consent to commence this lawsuit.

4 As stated, there has been no corporate minute, consent, resolution or written
5 agreement signed by ZOU and MURILLO indicating that ZOU ever agreed to resign
6 as a director of ACCU. (CUF No.10).

7 To the contrary, the evidence shows that MURILLO admitted in his August 26,
8 2021 email that ZOU "wanted to resign"(Ex. E), and subsequently in his 8-30-21 letter
9 that he felt the parties an agreement about ZOU's "resignation of being Vice
10 President" in ACCU. CUF No. 4; Ex. F. In other words, ZOU *did not* resign as a
11 director in ACCU, a fact of which was acknowledged by MURILLO. *Id.*

12 The evidence further shows that ZOU made written proposal of "resignation
13 clauses" to MURILLO in October 2021, but MURILLO never responded to ZOU's
14 proposal. CUF Nos. 5 & 6; Ex. G. As such, the parties never come to terms as to
15 ZOU's exit or resignation from ACCU.

16 Accordingly, because MURILLO fails to obtain proper authority to prosecute
17 or maintain this lawsuit in the name of ACCU, this lawsuit should be summarily
18 dismissed. Pursuant to the cited legal precedents, when there exists a shareholder
19 deadlock, the proper avenue of remedy is shareholder derivative lawsuit. *Anmaco*, 13
20 Cal. App. 4th 891, 900. It is, thus, respectfully submitted that the Court grant the
21 requested summary judgment.

22 **V. OPPOSING PARTY'S ARGUMENT**

23 Lurking underneath Zou's moving papers – she never states this outright -- is
24 the innuendo that she never resigned from the Company's board, but instead was
25 somehow "ousted" from her board and officer positions. *See* Zou's Separate
26 Statement of Undisputed Facts at ¶¶ 2 and 5. But, as with most of Zou's moving
27 papers, her declaration is entirely silent on this point. For this reason, the Court is
28 entitled to disregard this claim. *See Orr v. Bank of America, NT & SA*, 285 F.3d 764,

1 773 (9th Cir. 2002) (“A trial court can only consider admissible evidence in ruling on
2 a motion for summary judgment.”); *Hernandez v. Spacelabs Med. Inc.*, 343 F.3d
3 1107, 1112 (9th Cir. 2003) (nonmoving party “cannot defeat summary judgment . . .
4 with unsupported conjecture or conclusory statements”).⁴

5 Contrasted with Zou’s failure to come forward with any evidence about being
6 “ousted”, Zou’s own emails demonstrate that in late 2021 she *resigned* from the
7 Company. Murillo Decl. at ¶ 6 and Exhibit J. Moreover, her own emails thoroughly
8 rebut her unsupported innuendo that she was “ousted”, thereby creating yet another
9 disputed issue of material fact.

10 A. **The *Anmaco* Decision Is Inapplicable Where, As Here, Accu Had**
11 **A Sole Director At The Time This Lawsuit Was Filed**

12 In her moving papers, Zou relies heavily on the decision in *Anmaco v. Bohlken*,
13 13 Cal. App. 4th 891 (1993) for the proposition that Murillo does not have the ability
14 to sue in the Company's name. The *Anmaco* decision is inapposite because it rested
15 on a key feature not present in the case at bar.

16 In *Anmaco*, the corporation was governed by two directors who were at
17 loggerheads. The key question in that case was whether one of those directors, who
18 was also the president of a corporation, could bring a suit against the other director,
19 who was also a 50% shareholder.

20 The decision in *Anmaco* did not turn on the fact that the target of the company's
21 suit was a 50% stockholder. It turned instead on whether the deadlock at the board
22 level precluded the corporate president from bringing the lawsuit on the corporation’s
23 behalf. *Anmaco* at 898-900.

24 In this regard, the Court relied on authority having to do with deadlock at the
25

26 _____
27 ⁴ Zou’s claim that she was “ousted” from her board and officer positions is further
28 undermined by the fact that her pending counterclaims fail to assert any such claim.
As such, they are waived. *See Dragor Shipping Corp.*, 378 F.2d at 244.

1 board level, not the shareholder status of the target of the company’s suit. Thus, the
2 court cited as precedent those authorities dealing with the exercise of executive power
3 where there is corporate deadlock. *Id.* Notably, the *Anmaco* Court “express[ed] no
4 view on the president’s power to institute or defend litigation in an emergency or
5 involving an outsider. or where the bylaws may grant the power to do so.” *Id.* at 900
6 n.2.

7 This factual context in *Anmaco* is far cry from the case at bar. In this case, it is
8 clear - - from her own words - - that Zou resigned from the Company in **2021**. In the
9 wake of her resignation, Murillo became the sole director of the Company as provided
10 under the Company’s bylaws, Exhibit I. There was thus no board “deadlock” at the
11 time this suit was filed in **2022** that could have theoretically affected Murillo's
12 entitlement to bring suit on behalf of the Company.⁵

13 Courts in similar circumstances have permitted the sole active officer and
14 director to initiate litigation on behalf of the corporation. For example, *Rothman &*
15 *Schneider, Inc. v. Beckerman*, 2 N.Y.2d 493, 499 (1957), involved a closely-held
16 company directed by two individuals, a president and secretary-treasurer. Following
17 the retirement of the corporation’s president, the court held that the “company’s only
18 active officer was authorized to institute and prosecute” a lawsuit against the retired
19 president's son. *Id.*; *see also Storix, Inc. v. Johnson*, 2020 WL 7777493, at *7 (Cal.
20 Ct. App. Dec. 31; 2020) (unpublished) (distinguishing *Anmaco* based on absence of
21

22 ⁵ The out of state cases cited by Zou on this point are similarly inapposite. Unlike
23 the present case, each of Zou’s cited cases involved the absence of board
24 authorization to proceed with litigation. *Stone v. Frederick*, 245 A.D.2d 742, 745
25 (1997) (discussing shareholders “with an equal interest and degree of control over
26 corporate affairs.”); *Borkowski MBI v. Fraternal Order of Police*, 155 F.R.D. 105,
27 110 (E.D.Pa. 1994) (president of closely held corporation did not have right to sue
28 in his capacity as president when there was deadlock between two 50-50
shareholders who also served as board of directors); *Gross v. Adcomm, Inc.*, 478
S.W.3d 396, 404 (Ky. Ct. App. 2015) (same).

1 deadlock and finding that “[t]he majority board had the authority to bring a lawsuit to
2 recover for the corporation’s damages allegedly caused by one of the
3 shareholders/directors.”).

4 **B. Because There Are Disputes As To Material Factual Issues,**
5 **Especially Whether Zou Resigned As A Board Member, Summary**
6 **Judgment Should Be Denied**

7 Where there is a dispute of a material fact, summary judgment must be denied.
8 *See* F.R. Civ. Proc. 56 (a); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986).

9 Here Zou claims that Murillo cannot bring suit in the company’s name. Her
10 argument rests on the innuendo in her papers that “because” she was a company
11 director in August, 2022 and did not authorize the filing suit, the suit should be
12 dismissed.⁶

13 But her core contention – that she was a director of the company at the time
14 this suit was filed – is hotly disputed. And since her motion turns on whether she
15 resigned from the company’s board, summary judgment cannot possibly be granted.
16 *See Anderson, supra*, 477 U.S. at 255.

17 It is basic that the existence of disputed material facts preclude the entry of
18 summary judgment. Here the disputed material fact – whether Zou resigned her board
19 seat - is core to Zou’s motion. As that factual dispute cannot be resolved in connection
20 with this motion, her motion must be denied.

21 **C. In The Event The Court May Be Inclined To Grant The Motion, It**
22 **Should Not Enter ZOU’S Proposed Judgment, But Should Instead**
23 **Allow The Case To Proceed As A Derivative Action**

24
25 ⁶ We have noted above that Zou never actually comes out and says that she was in
26 fact a board member at the time this suit was filed in August, 2022. This omission is
27 fatal to her ability to pursue this motion: it entirely undermines her reliance on
28 *Anmaco* which involved a close corporation having **two sitting directors at the**
 time the pertinent suit was filed.

1 Even if the Court were inclined to grant Zou's motion it should not enter
2 Judgment in Zou's favor. This is because her proposed Judgment could have
3 preclusive effect as to a future derivative suit against Zou that Murillo may wish to
4 bring on the company's behalf.

5 As Zou's Notice of Motion fails to give notice that the relief she seeks includes
6 an order barring any future derivative actions against her, the Court lacks jurisdiction
7 to enter the proposed Judgment. Instead, and even if the Court is inclined to grant
8 Zou's motion, it should allow Murillo to amend his complaint to refile the action as a
9 derivative action on behalf of the company.

10 Doing otherwise would effectively release Zou from her conduct that has
11 damaged the company. For this reason, the Court should refrain from entering the
12 proposed Judgment lodged by Zou even if it were inclined to grant her motion.

13 **D. Because Of Its Pervasive Non-Compliance With The Court's Rules,**
14 **Zou's Declaration Should Be Stricken**

15 The Court should strike Zou's moving papers because of their pervasive non-
16 compliance with the Court's rules. The following instances are merely illustrative;
17 they are not exhaustive.

18 • *The submission of testimony that has nothing to do with any of the issues*
19 *pertinent to this motion.*

20 The Court's Civil Standing Order provides in part that "[n]o party shall submit
21 evidence other than the specific items of evidence or testimony necessary to support
22 or controvert a proposed statement of undisputed fact". *Id.* at p. 11, lines 26-28.

23 Despite this Court rule, Zou introduces testimony about Accu's profitability
24 and officer salaries (Zou Decl. at ¶ 3); its payroll and cash balances (Zou Decl. at ¶ 4);
25 dividends (Zou Decl. at ¶ 5); her alleged stock-picking ability (Zou Decl. at ¶ 6); and
26 irrelevant details about her dealings with foundries in China (Zou Decl. at ¶ 7).

27 None of these matters have the slightest relevance to any issues pertinent to
28 Zou's motion and their gratuitous inclusion violates the Court's rules. Accordingly,

1 Zou’s declaration should be stricken.

2 • *The purported introduction of exhibits that are not even attached to*
3 *Zou’s moving papers.*

4 In her declaration, Zou identifies and purports to introduce into evidence two
5 exhibits - - Exhibit C (certain tax reporting documents) and Exhibit D (a February,
6 2020 bank statement). Unaccountably, neither of these exhibits is actually attached to
7 her moving papers. How these missing documents (whose contents are wholly
8 undisclosed) are relevant to any conceivable issue presented by Zou’s motion is never
9 explained.

10 • *The presentation of conclusions that are unsupported by any facts.*

11 Throughout her declaration, Zou puts forward conclusions such as she was
12 “ousted” by Murillo (Zou Decl. at ¶ 2); she was “excluded” from her roles at Accu
13 (Zou Decl. at ¶ 2); and that “Murillo blocked me from accessing Accu’s management,
14 operation [sic], cash reserves and bank accounts” (Zou Decl. at ¶ 9).

15 All of these statements are mere conclusions which are unsupported by any
16 facts. In this regard, it is basic that factual averments in a party’s memorandum must
17 be supported by citations to the factual record. Fed. R. Civ. P. 56(c)(1)(A); *see*
18 *Hernandez v. Spacelabs Medical, Inc.*, 343 F.3d 1107, 1116 (9th Circuit 2003)
19 (“conclusory allegations, unsupported by facts, are insufficient to survive a motion
20 for summary judgment”). Here, Zou’s moving papers make claims having no support
21 in the factual record. For this reason, those statements should be disregarded by the
22 Court and Zou’s non-compliant declaration should be stricken. *See Brew v. City of*
23 *Emeryville*, 138 F. Supp. 2d 1217, 1226–27 (N.D. Cal. 2001).

24 VI. CONCLUSION

25 A. Moving Party’s Conclusion

26 Based upon the foregoing, it is respectfully requested that Defendant and
27 Counter-Claimant Elizabeth Yunhong Zou’s Motion for Summary Judgment be
28 granted.

1 **B. Opposing Party’s Conclusion**

2 For the foregoing reasons, the Court should deny Zou’s motion for summary
3 judgment.

4 **MOVING PARTY’S REPLY**

5 **I. THE UNDISPUTED FACTS**

6 Pursuant to the parties’ Statement of Uncontroverted Facts concurrently filed,
7 the following facts are undisputed:

- 8 i. Five days after the 8/25/21 meeting, Murillo wrote to Zou on ACCU’s
9 behalf, stating that he “felt” the parties “had an agreement which was to
10 accept your resignation of being Vice President.” (CUF No. 4; Ex. F)
- 11 ii. Subsequently, on October 4, 2021, Zou wrote a written proposal to Murillo
12 for her exit plan(i.e., resignation clauses). (CUF No. 5; Ex. G)
- 13 iii. Murillo never responded to Zou’s 10-4-2021 proposal. (CUF No. 6)
- 14 iv. ACCU’s 1-7-22 Statement of Information filed by Murillo in which he
15 named himself as “sole director” was not consented by Zou. (CUF No. 8)
- 16 v. To date, Murillo has exclusive access and control of ACCU’s cash except
17 for the Citi and TD Ameritrade accounts frozen by Murillo. (CUF No. 9)
- 18 vi. There has been no corporate minute, consent, resolution or written
19 agreement signed by Zou and Murillo indicating that Zou ever agreed to
20 resign as a director of ACCU. (CUF No. 10)
- 21 vii. Prior to filing of this lawsuit, no shareholder or director’s meeting of
22 ACCU ever took place to vote on retaining ERVIN COHEN & JESSUP
23 LLP. (CUF No. 12)

24 **II. THE DISPUTED FACTS**

25 While conceding that Murillo and Zou have been equal shareholders and
26 directors at ACCU before their dispute in 2021, ACCU/Murillo contends that Zou
27 resigns in November 2021, and that ACCU has no vice president.

1 **III. ARGUMENT**

2 **A. Article II, Section 19 of ACCU’s Bylaws Requires Director’s**
3 **Resignation Notice to be Submitted in Writing, and It Cannot be**
4 **Made Verbally.**

5 ACCU argues that there is no deadlock at the board level when this case was
6 filed because “Zou resigned in 2021” and that Murillo is purportedly the sole director
7 in ACCU. In support, ACCU alludes to an alleged verbal request made by Zou to
8 Murillo during the August 25, 2021 meeting.

9 However, such purported verbal request is immaterial because ACCU’s
10 bylaws, Article II, Section 19 mandates that “**director may resign effective upon**
11 **giving written notice...**” See Exhibit I, p. 7. The written notice requirement similarly
12 applies to resignation of officer(i.e., Article III, Section 4). *Id.*

13 Here, as conceded by ACCU in its opposition, there has never been any written
14 resignation notice submitted by Zou to resign as a director in the company. Without
15 satisfying the written resignation notice requirement under Article II, Section 19 of
16 ACCU’s bylaws, Zou has not and could not have resigned as a director or board
17 member. As such, a purported dispute concerning whether Zou made an alleged
18 verbal request to resign as a director is inconsequential and should not preclude the
19 granting of summary judgment. *See Arpin v. Santa Clara Valley Transp. Agency*, 261
20 F.3d 912, 919 (9th Cir. 2001)[Disputes over irrelevant or unnecessary facts the
21 resolution of which would not affect the outcome of the suit are irrelevant to the
22 Court’s consideration in granting summary judgment].

23 Given ACCU’s failure to show that Zou ever resigned in accordance with the
24 mandated procedure under its bylaws, it is submitted that Zou’s Motion should be
25 granted. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325(1986)[“[T]he burden on the
26 moving party may be discharged by ‘showing’ – that is, pointing out to the district
27 court – that there is an absence of evidence to support the nonmoving party’s case.”];
28 *also Arpin*, 261 F.3d at 919[“The mere existence of a scintilla of evidence in support

1 of the non-moving party’s position is not sufficient” to preclude summary judgment].

2 **B. The New Alleged Dispute Re: “Vice President” Argument Does not**
3 **Present a Genuine Issue of Material fact.**

4 Murillo’s contention that ACCU does not have vice president is a red-herring
5 and does not present a genuine issue of material fact.

6 As discussed, since there does not exist any written resignation notice made by
7 Zou in compliance with Article II, Section 19 of ACCU’s bylaws, Zou could not have
8 resigned as a board member/director. Thus, whether ACCU had vice president,
9 whether Zou was a vice president, or whether Zou resigned as a vice president is
10 inconsequential for purpose of this motion.

11 Moreover, Murillo’s assertion represents his personal speculation without
12 evidentiary support. *See Thornhill Publ’g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d
13 730, 738 (9th Cir. 1979)[Conclusory, speculative testimony in affidavits and moving
14 papers is insufficient to raise genuine issues of fact and defeat summary judgment.];
15 *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986)[more
16 than a “metaphysical doubt” is required to establish a genuine issue of material fact].

17 Further, this assertion only serves to mislead the Court. It is an *undisputed* fact
18 that Murillo admitted on the August 30, 2021 letter that Zou resigned “of being Vice
19 President” of ACCU, not as a board member/director. (CUF No. 4; Ex. F). Besides
20 Murillo’s admission to the 8-30-21 letter, the very first email in Exhibit J is Zou’s
21 email response to Murillo’s August 30, 2021 letter[“Regarding your Aug 30, 2021
22 email (attached), I agree that we need to continue to communicate on what actions
23 needs to be taken now that I have resigned”]. *See* Exhibit J, pp. 2-3.

24 Likewise, the Court should take judicial notice that ACCU admitted in its
25 evidence in support of its Motion for Summary Adjudication(Dkt. No. 77; Exhibit 9,
26 p.44) that Zou is ACCU’s Vice President. Murillo further signed the same document
27 along with Zou being the “Vice President” of ACCU on 2/25/2020 (Dkt. No. 77;
28 Exhibit 9, p.52). Consistently, ACCU’s bylaws expressly allow for a vice president

1 position. *See i.e.*, Sections 1 & 8 of Article III(Ex. I, pp.7-8).

2 In sum, Murillo’s new assertion is self-contradictory, lacks factual support, and
3 should be properly disregarded as immaterial. *Anderson*, 477 U.S. at 248 [“Factual
4 disputes that are irrelevant or unnecessary will not be counted.”].

5 **C. ACCU’s “Irrelevant” Objection to Zou Declaration is Improper.**

6 ACCU’s final argument is that the moving party’s declaration should not be
7 considered because it contains irrelevant information.

8 But the function of motion for summary judgment is to determine whether there
9 is relevant evidence. Courts in this Judicial District have consistently ruled that
10 objection to evidence based on relevance is improper because such objection “[is]
11 duplicative of the summary judgment standard itself”, “redundant” and thus,
12 unnecessary to consider. *See Katzkin Leather, Inc. v. Roadwire, LLC*, CV 20-2093
13 DSF (RAOx) (C.D. Cal. May 6, 2022), at *7, citing *Burch v. Regents of Univ. of Cal.*,
14 433 F. Supp. 2d 1110, 1119 (E.D. Cal. 2006); *Eidem v. Target Corp.*, Case No. EDCV
15 10-01000 VAP(DTBx) (C.D. Cal. Aug. 24, 2011), at *5[“Both sides cite facts that are
16 not relevant to resolution of the Motion. To the extent certain facts are not mentioned
17 in this Order, the Court has not relied on them in reaching its decision.”].

18 Furthermore, ACCU fails to submit any statement of genuine disputes, which
19 allows the Court to assume moving party’s material facts are adequately supported.
20 *See* Local Rule 56-3[“In determining any motion for summary judgment or partial
21 summary judgment, the Court may assume that the material facts as claimed and
22 adequately supported by the moving party are admitted to exist without controversy
23 except to the extent that such material facts are (a) included in the “Statement of
24 Genuine Disputes” and (b) controverted by declaration or other written evidence
25 filed in opposition to the motion.”]

26 Finally, Zou’s contention that she was excluded or ousted by Murillo is
27 supported by at least two *undisputed* facts. It is undisputed that Murillo named himself
28 as ACCU’s sole director in the company’s 1-7-22 Statement of Information, filing of

1 which was never consented by Zou. (CUF No. 8, Ex. H). It is also undisputed that
2 Murillo has exclusive access and control to ACCU's cash except for the Citi bank and
3 TD Ameritrade accounts frozen by Murillo. (CUF No. 9).

4 **IV. MOVING PARTY'S REPLY CONCLUSION**

5 According to mandated requirements under Article II, Section 19 of ACCU's
6 bylaws, Zou did not resign as a director. Thus, Zou is an equal shareholder/director
7 in the company. Following the legal principles illustrated in *Anmaco*, 13 Cal. App.
8 4th 891, and the mandated requirements under ACCU's bylaws, Murillo, before
9 engaging counsel to file suit in the name of ACCU, is required to obtain approval with
10 a majority of the directors present constituting a quorum. In light of Murillo's lack of
11 authorization from the board of director to engage counsel and to initiate this lawsuit
12 on ACCU's behalf, this Action should be summarily dismissed.

13
14 Respectfully submitted,

15
16 DATED: April 20, 2023

L.A. COMMERCIAL ATTORNEY, A PROF.
LAW CORP.

17
18 By: /s/Christopher D. Lee

19 Christopher D. Lee

20 Attorneys for Defendant/Cross-Complainant
21 ELIZABETH YUNHONG ZOU

22 DATED: April 20, 2023

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